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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-372

LAW RESEARCH SERVICE, INC. and
ELLIAS C. HOPPENFELD,
Petitioners,

against

BLAIR & CO., GRANBERY MARACHE,
INCORPORATED,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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On October 26, 1971, this Court granted certiorari in the case of *Atlantic Coast Line Railroad Company* v. *Erie Lackawanna Railroad Company* (No. 71-107).

The main question presented in the *Atlantic Coast Line* case is whether or not this Court should establish a right to contribution between joint tortfeasors under maritime common law in non-collision cases. The question presented on the instant petition for certiorari is whether or not there is a right to contribution between intentional joint tortfeasors who have violated a federal statute, when the statute so violated makes no provision for contribution.

In both cases there is also presented the question that since there is no federal statute providing for contribution should the Court look to the state statute to determine whether or not a right of contribution exists between the joint tortfeasors.

Thus, substantially the same question is presented in both cases. In the *Atlantic Coast Line* case this Court is called upon to determine whether or not a court exercising maritime jurisdiction may fashion a new rule of judicial contribution whereas in the instant case this Court is called upon to determine whether or not a court exercising common law jurisdiction may fashion a new judicial rule of contribution, when in both instances Congress has acted in the field but has refrained from enacting legislation which directs contribution between joint tortfeasors applicable to these cases.

The similarity between the two cases does not end here. Both were recently decided by the Second Circuit with Judges Moore and Timbers comprising a majority of the court in both cases, which reached diametrically opposite results. In *Atlantic Coast Line* the Court of Appeals refused to direct contribution between joint tortfeasors under maritime law on the grounds that you held in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, 285-87 (1952), that there is no contribution between joint tortfeasors because Congress while acting in the field has stopped short of approving the rule of contribution urged and that it would be inappropriate to fashion a new judicial rule of contribution. In the instant case, both the District Court and the Court of Appeals completely ignored the fact that you held in *Halcyon* that "courts exercising jurisdiction in maritime affairs have felt freer than common law courts in fashioning rules" (342 U. S. at 285) yet approved the fashioning of a new judicial

rule of contribution between joint tortfeasors in this case, wherein the Court was exercising a common law jurisdiction, whereas in *Atlantic Coast Line* it refused to fashion a new judicial rule of contribution in a case arising under the court's maritime jurisdiction, although it stated that "Atlantic's contribution claim, so far as the equities are concerned, is appealing."

It would appear that by your granting certiorari in the *Atlantic Coast Line* case you are at least prepared to reevaluate your holding in *Halcyon* that you would not fashion a new judicial rule of contribution under maritime law and that solution of the problem should await Congressional action. The granting of certiorari in this case would also afford the Court the opportunity, in making such reevaluation, to determine whether or not you are prepared to fashion a new judicial rule of contribution between joint tortfeasors when the case arises under a common law jurisdiction, especially in view of the fact that as you pointed out in *Halcyon*, 342 U. S. at 285, that "[i]n the absence of legislation courts exercising a common law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors" and that "courts exercising jurisdiction in maritime affairs have felt freer than common law courts in fashioning [such] rules". Since you are apparently prepared to settle this important question under maritime law you should also at the same time afford yourself the opportunity of settling the same important question for the guidance of courts exercising a common law jurisdiction.

Furthermore, there is the question which has arisen in both the *Atlantic Coast Line* case arising under maritime law and the instant case arising under the common law as to whether or not your holding in *Halcyon*, 342 U. S. at

285, that "because Congress while acting in the field has stopped short of approving the rule of contribution here urged, we think it would be inappropriate for us to do so" leaves a void in federal law respecting contribution which a Federal Court is free to fill by the adoption of a state contribution statute or does that holding made by you in *Halcyon* that since much Congressional legislation is already in existence in both the maritime area involved in *Atlantic Coast Line* and the securities law area involved in the instant case and whether Congress by acting in both fields has preempted the field to the exclusion of the states and that Congress' refusal to act forbids any contribution whatsoever between joint tortfeasors.

Conclusion

In view of the foregoing and the reasons relied on for allowance of the writ set forth in the petition herein, it is urged that the Petition for a Writ of Certiorari in this case should be granted and that this case should be heard by this Court in conjunction with the case of *Atlantic Coast Line Railroad Company* v. *Erie Lackawanna Railroad Company* (No. 71-107), so that these important questions may be settled by this Court, not only for courts exercising maritime jurisdiction, but also for courts exercising common law jurisdiction.

Dated: New York, New York
November 1, 1971

Respectfully submitted,

GABRIEL I. LEVY,
Attorney for Petitioners.